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Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1335

VILLAGE OF SCHAUMBURG,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 590 F. 2d 220 (1978) and appears as Appendix A to the Petition for Writ of Certiorari filed herein.

The opinion of the United States District Court for the Northern District of Illinois is reprinted as Appendix B to the Petition for Writ of Certiorari filed herein.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 1, 1978. The Petition for Writ of Certiorari was docketed on February 28, 1979. The Petition for Writ of Certiorari was granted on April 23, 1979. The Petition for Writ of Certiorari was filed in accordance with 28 U. S. C. § 2101. The jurisdiction of this court is invoked pursuant to the provisions of 28 U. S. C. § 1254.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED.

This case involves the First and Fourteenth Amendments of the Constitution of the United States, and Chapter 22, Article III of the Schaumburg Village Code relating to charitable organizations. The relevant provisions are set forth in an appendix to this brief.

QUESTIONS PRESENTED FOR REVIEW.

1. Is Section 20(g) of Chapter 22 of the Schaumburg Village Code, which requires that 75 percent of the proceeds of charitable solicitations be used directly for the charitable purposes of the organization, unconstitutional either on its face or as applied?

2. Does a municipality have the right to prohibit purported charitable solicitations when the soliciting organization fails to demonstrate that at least 75 percent of its receipts are utilized for its charitable purposes?

3. Were the respondents entitled to a summary judgment holding that Section 20(g) of the ordinance of the Village of Schaumburg regulating charitable solicitations was invalid?

STATEMENT OF THE CASE.

This is a complaint for declaratory judgment and injunction initially brought by an organization known as Citizens For a Better Environment and two of its officers against approximately twenty municipalities in the Chicago metropolitan area. The complaint challenged the validity of the various ordinances of the municipalities which regulate solicitation for funds by organizations within their corporate limits. The respondents filed a motion for summary judgment against all the municipalities including the petitioner, Village of Schaumburg. Certain of the municipal defendants were dismissed by agreement and the District Court found provisions of various other ordinances to be unconstitutional.

An amended complaint was filed against the petitioners, the Village of Schaumburg, a home rule municipality located in Cook County, Illinois, its Village Board and Police Chief. (A5)

The Village had adopted an ordinance regulating charitable organizations within the corporate limits of the Village. (A22) The ordinance provided a framework for the issuance of permits to charitable organizations desiring to solicit funds in the Village including various standards defining the charitable organization to be regulated. The only provision of the ordinance challenged by the respondents was a section which required, in effect, that at least 75 percent of the proceeds of the solicitations by the organization regulated be used directly for charitable purposes of the organization.

That section, designated 20(g) of Chapter 22 of the Village Code, required:

> "Satisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization. For such purposes, the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:
>
> (1) Salaries or commissions paid to solicitors;
>
> (2) Administrative expenses of the organization, including, but not limited to, salaries, attorney's fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.
>
> For the purpose of satisfying the requirements of subparagraph (g), the organization shall submit a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five percent of the funds collected are utilized directly and solely for the charitable purpose of the organization."

The respondents refused to submit the information necessary to satisfy this requirement and were denied a permit. It was admitted that if all the conditions of the ordinance were met, the Village Board had no discretion and, by the terms of the ordinance, was required to issue such permit.

The amended three count complaint against the Village and its Board of Trustees and Police Chief alleged that jurisdiction was invoked under Section 1 of the Fourteenth Amendment, Sections 1331, 1343(3), and 1651 of Title 28, and 1983 and 1988 of Title 42 of the United States Code. (A5)

Count I identified the plaintiffs and defendants and described the ordinance in question. It alleged that CBE had requested permission to canvass and their final request for solicitation had been denied. The complaint then alleged that Section 22-20, requiring satisfactory proof that at least 75 percent of such solicitations be used directly for charitable purposes, was in violation of the plaintiffs' constitutional rights in that the plaintiffs were being subjected to a deprivation of their rights to free

speech, to freedom of association, and to access to the courts. It was alleged that they were deprived of equal protection of the laws, life, liberty and property without due process of law, and of their rights, privileges and immunities in violation of the Fourteenth Amendment. (A9)

Count II alleged that the ordinance requiring a permit was so strict, odious, and vague as to be in violation of the plaintiffs' constitutional rights and was unreasonable interference in the exercise of the plaintiffs' rights to freedom of speech, freedom of press, freedom of association, and their rights to access to the courts as guaranteed by the First and Fourteenth Amendments. (A10)

Count III alleged that the ordinance and threat of enforcement constitutes a prior restraint and unreasonable interference with the exercise of plaintiffs' rights to freedom of speech, freedom of press, freedom of association, and rights to access to the courts as guaranteed by the First and Fourteenth Amendments. (A12)

The Village, in its answer, alleged it had no knowledge sufficient to form a belief with respect to the character of the plaintiffs, except that they have canvassers who solicit funds for the organization. The Village denied the conclusions of the amended complaint and denied that the Village Board acted without legal authority. It was averred that if the plaintiffs applied for a permit and met the requirements of the ordinance, permits would be granted. The Village denied that the ordinance was so strict, odious or vague as to be in violation of the plaintiffs' constitutional rights and averred that the ordinance was a valid and constitutional exercise of the police power vested in the Village. (A29)

The Village denied that the permit is issued at the arbitrary discretion of the Board and that the ordinance was so strict, odious or vague as to be in violation of the plaintiffs' constitutional rights. The Village denied that the ordinance was unconstitutional or constituted a prior restraint upon, and an

unreasonable interference with the plaintiffs' rights to freedom of speech, press and association and access to the courts. (A31)

As affirmative defenses, it was alleged on information and belief that CBE is primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes are negligible as compared with the primary objective of raising funds. More than 60% of the funds collected have been spent for the benefit of employees and not for any charitable purposes. (A33)

In support of its allegations, the Village submitted certain newspaper articles and further averred that there was no absolute right under the Constitution to enter upon the private premises of another and knock on the door for any purpose and that the police power permits reasonable regulation for public safety. (A34, 35, 36, 37)

The plaintiffs' motion for summary judgment was based on the ground that there was no genuine issue as to any material fact and the plaintiffs' were entitled to judgment as a matter of law. It was supported by an affidavit of Larry A. Hoellwarth, an employee of Citizens For A Better Environment, who is involved in the direct supervision of the canvassing program. His affidavit alleged that the organization was incorporated as a not-for-profit corporation in 1971 and that it was in good standing with the Charitable Trust Division of the office of the Illinois Attorney General and has been granted tax-exempt and tax-deductible status by the United States Internal Revenue Service. The affidavit stated that CBE employs a staff of canvassers who are screened, trained and observed prior to hire, and that following their training each canvasser is registered with the office of the Attorney General. That CBE is supported almost entirely by small contributions from individual citizens and that door-to-door canvassing is the single, most important source of funds. The affidavit set forth that in the door-to-door canvassing representatives distribute informative

pamphlets on environmental subjects and also accept pollution complaints. (A40)

In its answer to the motion for summary judgment, the Village stated that the motion was improper because there were genuine issues as to material facts and the complaint failed to set forth facts wherein the plaintiffs had been denied any federally protected constitutional or statutory rights and the allegations of the complaint were merely the unsupported conclusions of the pleader. (A42)

SUMMARY OF ARGUMENT.

I.

The ordinance in question here is neither unconstitutional on its face nor as applied. There is no absolute right under the Federal Constitution to enter on the private premises of another and knock on his door for any purpose. The police power on the State and Municipal level permits the type of reasonable regulation present here. The provisions in question are not unconstitutionally vague but are clear standards which, if met, entitle an applicant to a permit to solicit for charitable purposes. There is no lack of standards in the ordinance, nor is there a vesting of unbridled discretion in municipal officials in the issuance of permits which would violate constitutional guanrantees.

The balancing of the First Amendment rights of the respondent against the right of citizens to be left alone in the free enjoyment of their homes does not require the uncontrolled type of solicitation sought here. The Court of Appeals recognized that the ordinance was not necessarily unreasonable on its face as to some types of charitable organizations but it failed to recognize that holding the ordinance unconstitutional here opens the door to unrestricted solicitation in the name of charity by organizations which may, in fact, be practicing fraud or deceit on the unwitting public.

II.

There is an important municipal and state interest at stake in protecting the public from fraud, crime and undue annoyance by door-to-door solicitation on private property by alleged charitable organizations which, in fact, devote a substantial portion of their revenues to other than charitable purposes.

This court has never announced a rule that solicitation in the name of charity was beyond the scope of reasonable municipal regulation or that the public was not entitled to a truthful representation of the nature of the solicitation. The petitioners' ordinance is intimately related to the articulated substantial governmental interests recognized by this court in the regulation of such solicitation. The ordinance sets forth specific standards which are not vague or unreasonable. The right of a municipality to protect its citizens from fraudulent and disruptive solicitation on private property represents a proper exercise of municipal police power. The First and Fourteenth Amendments do not give unbridled license to annoy and mislead under the guise of freedom of speech.

III.

The Trial Court erred in granting a motion for summary judgment. There were material issues of fact which prevented the granting of such motion. The granting of a motion for summary judgment is improper when inferences can be drawn from underlying facts which, when viewed in the light most favorable to the party opposing it, indicate the presence of material issues of fact. The Village was deprived of its opportunity to show that, in fact, the respondent was principally engaged in solicitation of funds for profit and was misusing the guise of environmental protection and free speech for its commercial gain.

The Court of Appeals specifically determined that it would not pass upon the reasonableness of the 75 percent requirement as applied to "more traditional charitable organizations," but it refused an inquiry as to the real nature of the respondent. The office of summary judgment is not to preclude a trial on the merits under these circumstances.

In its zeal to protect First Amendment rights, the Court of Appeals, as did the Trial Court, in fact denied to the Village the equally fundamentally right to a full and adequate trial on the merits. The ordinance of the Village of Schaumburg is constitu-

tional on its face. The plaintiffs have the burden of showing that the ordinance was unreasonable as applied. Their amended complaint failed to set forth facts which, even if proven, would overcome the presumption of validity.

The Trial Court erred in granting the motion for summary judgment and its error was compounded by the decision of the Court of Appeals which should be reversed.

ARGUMENT.

I.

SECTION 20(g) OF CHAPTER 22 OF THE SCHAUMBURG VILLAGE CODE REQUIRING 75% OF THE PROCEEDS OF CHARITABLE SOLICITATIONS TO BE USED DIRECTLY FOR THE CHARITABLE PURPOSES OF THE ORGANIZATION IS CONSTITUTIONAL.

This is a declaratory judgment action brought by the Respondent Citizens for a Better Environment against the Village of Schaumburg. Respondent seeks a declaration that the provisions of the Schaumburg ordinance requiring that charitable organizations seeking a permit to solicit must show that 75% of the funds solicited are used for charitable purposes are unconstitutional. The only substantive issue in this case is whether the 75% requirement violates the First Amendment. Although the trial court held the 75% requirement invalid on its face, the Court of Appeals recognized that the ordinance may be reasonable as applied to the more traditional charitable organizations, but held that the requirement on its fact was unreasonable when applied to an organization such as the Respondent. 590 F. 2d 220, 225 (CCA 7, 1978)

As we shall demonstrate below, we believe that the trial court erred in granting a motion for summary judgment; but it is also clear that as a matter of law the ordinance is both constitutional on its face and constitutional as applied to the Respondent.

It should be emphasized at the outset that although Section 20(g) of Chapter 22 is the only provision of the Schaumburg ordinance at issue here, that section is but a part of a comprehensive method of regulating both commercial and charitable peddlers and solicitors. The Village Code in Article II, Sections 22-6 through 22-18 regulate the activities of for-profit peddlers

and solicitors. Charitable solicitations are regulated by Article III, Sections 22-19 through 22-24.

Section 22-19 defines "charitable organizations" as well as "charitable purpose" and "contributions". (A22) Section 22-20 spells out the requirements for permits and the contents of the application. Section 22-20 further sets forth the standards which must be met including subparagraph (g) which is at issue here.

The fundamental right of municipalities to regulate the kind of solicitation here involved has long been recognized by this and inferior courts. This Court's opinion in *Hynes* v. *Mayor of Oradell*, 425 U. S. 619, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976) is a complete vindication of such a municipal right. See also *Breared* v. *City of Alexandria*, 341 U. S. 622, 95 L. Ed. 1233 (1951). Moreover, it is well established that a Village has a legitimate interest in protecting its citizens from fraud by solicitors who would use the funds collected for purposes other than those expressly or impliedly represented. It has a similar protective interest in identifying organizations where salaries paid are so large in relation to the services provided that the organization is actually a for-profit venture. *Citizens for a Better Environment* v. *Village of Schaumburg*, 590 F. 2d 220, 225; *National Foundation* v. *City of Fort Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. denied* 396 U. S. 1040, 90 S. Ct. 688, 24 L. Ed. 2d 684 (1970).

The question presented to the Court in this matter requires a balancing of alleged First Amendment rights against the equal compelling constitutional right of homeowners to be secure in the peaceful enjoyment of their property and the ability of municipal governments to protect that right. We suggest that contrary to the view of the Court of Appeals, the ordinance in question here is in all respects a valid exercise of the police power of the Petitioner Village. It is not impermissibly vague on its face or as applied. The summary judgment entered by the trial court precluded an investigation into the actual nature of the

Respondent organization. It is clear however that even if CBE is what it claims to be, an environmental protection organization, the provisions of the Schaumburg ordinance in question here do not deprive it of any constitutionally protected rights.

A. The Ordinance Is Valid Under the Police Power and Does Not Deprive the Respondent of Its First Amendment Rights.

The most recent authoritative decision with respect to the question presented is the opinion in *Hynes* v. *Mayor of Oradell*, 425 U. S. 610, 48 L. Ed. 2d 243 (1976). That case involved the constitutionality of a borough ordinance which required that any person, including representatives of civic groups and organizations desiring to canvass or solicit for a recognized charitable cause or for a political campaign or cause, must notify the police department in writing for identification only.

The Court held that the ordinance in question was invalid because the ordinance's coverage was unclear, there being no explanation as to what was a "recognized charity"; what was meant by a "federal, state, county or municipal . . . cause" or what groups fell into the class of borough civic groups and organizations. The Court further held that the ordinance did not sufficiently specify what actions were necessary for compliance, there being no explanation as to what must be included in the notice or what the police considered sufficient as identification, and explicit standards were not provided for those who applied the ordinance.

However, the case is most significant for laying down certain basic propositions which are totally controlling in the case at bar. The thrust of *Oradell* is clearly that a municipality has the right to protect its citizens from crime and annoyance by regulating soliciting and canvassing and that there is no absolute right under the Constitution to make such solicitation. Although the ordinance in question in the *Oradell* case was held to be invalid, it was held invalid because of vagueness and lack of

standards. These defects are clearly not present in the Schaumburg ordinance. The Court specifically pointed out that:

> ". . . the court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what message residents will hear, may serve these important interests without running afoul of the First Amendment." 425 U. S. 610, 616, 48 L. Ed. 2d 243, 251.

At 425 U. S. 619, 48 L. Ed. 2d 252 this Court went on to use language which is totally controlling in the case at bar, it said:

> "There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. We cannot say, and indeed appellants do not argue, that door-to-door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home. See Roman v. Post Office Dept., 397 U.S. 728, 735-738, 25 L.Ed. 2d 736, 90 S.Ct. 1484 (1970)."

The provisions which the Court found defective, included the phrase, "recognized charitable cause" and a "federal, state, county or municipal cause". It was also not clear in the ordinance what groups fell into the class of "Borough Civic Groups and Organizations" that the ordinance also covered. 425 U. S. 621, 48 L. Ed. 2d 243, 253. The ordinance in question also failed because it did not sufficiently specify what those within its reach had to do in order to comply.

The defects in the *Oradell* ordinance do not exist in the Schaumburg ordinance. The ordinance is absolutely and totally clear both with respect to the standards to be applied and the manner in which a permit is to be sought. Section 22-19 of the ordinance clearly defines a charitable organization. The provi-

sions of Section 22-20 explain the contents of the application and resolve any doubt as who or what organization is in fact covered by the ordinance in question.

The Court of Appeals for the Fifth Circuit has specifically held constitutional an ordinance which limited the cost of solicitation of charitable contributions within the city to 20% of the total receipts. *National Foundation* v. *City of Fort Worth*, 415 F. 2d 41 (1969), cert. denied, 396 U. S. 1040, 90 S. Ct. 688, 24 L. Ed. 684 (1970), the Court at page 45 said:

> "No constitutional right exists to make public solicitation of funds for charity. The reasonable regulation of charitable organizations is within a government's police power. Cantwell v. State of Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213; American Cancer Society v. City of Dayton, 1953, 160 Ohio St. 114, 114 N.E.2d 219; Gospel Army v. City of Los Angeles, 1945, 27 Cal.2d 232, 163 P.2d 704; Eye Dog Foundation v. State Board of Guide Dogs, supra, 63 Cal.Rptr. at 30, 432 P.2d at 726; City of Seattle v. Rogers, 1940, 6 Wash.2d 32, 106 P.2d 598, 130 A.L.R. 1498; Ex parte Williams, 1940, 345 Mo. 1121 ,139 S.W.2d 485, cert. denied Williams v. Golden, 311 U.S. 675, 61 S.Ct. 42, 85 L.Ed. 434; Ex parte White, 1935, 56 Okl.Cir. 418, 41 P.2d 488; Ex parte Dart, 172 Cal. 47, 155 P. 63 L.R.A. 1916D, 905, Ann.Cas. 1917D, 1127. In Cantwell, supra, the Supreme Court stated that:
>
> > 'Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." 310 U. S. at 306-307, 60 S. Ct. 904.
>
> Since the solicitation of funds for charity may be the subject of state regulation, we now inquire whether the ordinance adopted by the City to regulate public solicitation on the streets of Fort Worth was a reasonable exercise of its police power."

It went on to consider whether or not the ordinance in question was reasonable. At page 46, the Court of Appeals recognized the right of the municipality to deny permission to solicit if the cost of collection was excessive. It said:

> "As an incident to the right of a city to regulate the use of its streets by solicitors and as an element of the protection a city may afford its citizens, a city may reasonably require of one who wishes to solicit that he furnish it with a statement of the past and expected receipts and costs of collection of the funds solicited within its limits and to deny permission to solicit if the cost of collection is excessive."

The Court recognized that the burden was on the plaintiff to establish that the ordinance was unreasonable. It said at page 46:

> "Upon the Foundation rested the burden of establishing that the ordinance did not rest on any reasonable basis. Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130. It did not meet this burden and we cannot say that the limitation provisions of the ordinance are unreasonable, especially in light of the strong presumption of constitutionality afforded an ordinance. Goldblatt v. Town of Hempstead, supra; Mestre v. City of Atlanta, 5th Cir. 1958, 255 F.2d 401; Standard Oil Co. v. City of Tallahassee, 5th Cir. 1950, 183 F.2d 410, cert. denied 340 U.S. 892, 71 S.Ct. 208, 95 L.Ed. 647; City of Anchorage v. Richardson Vista Corp., 9th Cir. 1957, 242 F.2d 276; City of Seattle v. Rogers, supra; American Cancer Society v. City of Dayton, supra at 223 of 114 N.E.2d. The standards fixed by the ordinance are a valid and constitutional means of achieving the City's purpose of protecting its citizens."

The Court went on to reject an argument that the ordinance was lacking in definite and certain standards. An examination of the ordinance, which is set forth in a footnote to the opinion,

makes it clear that the Fort Worth ordinance was not nearly as specific or definite as the Schaumburg ordinance. It should be emphasized that *National Foundation* involved the use of public streets which this Court has recognized as more appropriate for the exercise of First Amendment rights than the private property involved in the case at bar.

The Court of Appeals in the instant case attempted to distinguish the *National Foundation* case on the ground that an organization which did not meet the requirement was given the opportunity to show that its percentage was not unreasonable. However, the Fifth Circuit opinion is not based upon such a distinction. The quotation from the case, which appears in the Court of Appeals opinion, was not the basis upon which the opinion rests. Instead, as indicated above, the Court clearly held that a city may reasonably require of one who wishes to solicit, a statement of the past and expected receipts and costs of collection and to deny permission to solicit if the cost is excessive.

This Court has, of course, repeatedly held that the First Amendment does not give unbridled discretion for the exercise of free speech on private property or even on public property. Reasonable requirements of "time, place and manner" have been repeatedly recognized even to the extent of prohibiting what might be free speech in certain open public areas, from being perpetrated on captive audiences on private property. Thus, in the case of *Tinker* v. *Des Moines Community School District*, 393 U. S. 503, 21 L. Ed. 2d 731 (1969), Mr. Justice Black in a dissenting opinion pointed out at page 517:

> "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 US 536, 554, 13 L Ed 2d 471, 85 S Ct 453 (1965), for example, the Court clearly stated that the rights of free speech and assembly 'do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.' "

Moreover, it is clear that the First Amendment does not require that individuals be permitted to go on private property to express their opinions, *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 33 L. Ed. 2d 131, and a municipality can even prevent the use of public streets by ordinance when the exercise of freedom of speech would result in an interference with normal activities. *Grayned* v. *City of Rockford*, 408 U. S. 104, 33 L. Ed. 2d 222 (1972).

The right of individuals to be left alone in the peaceful enjoyment of their homes has been sustained repeatedly, even in the face of First Amendment challenges. In *Rowan* v. *United States Post Office*, 397 U. S. 728, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970), this Court at page 737 said:

> "The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See Martin v. Struthers, supra; cf. Hall v. Commonwealth, 188 Va 72, 49 SE2d 369, appeal dismissed 335 US 875, 93 L Ed 418, 69 S Ct 240 (1948)."

The Court continued in *Rowan*:

> "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; . . . The ancient concept that 'man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. See Camara v. Municipal Court, 387 U S 523, 18 L Ed 2d 930, 87 S Ct. 1727 (1962).

This right of government to regulate was recognized again in *Cohen* v. *California*, 403 U. S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), where the Court at page 21 said:

". . . This Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of a home of unwelcome views and ideas which cannot be totally banned from the public dialogue. . . ."

In *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 41 L. Ed.2d 770, 94 S. Ct. 2714, this Court again balanced alleged First Amendment rights against the right of privacy when it held that a municipality could properly prevent political advertising on its transit vehicles. The Court cited *Packer Corp.* v. *Utah*, 285 U. S. 105, 110, 76 L. Ed. 643, 52 S. Ct. (1932), as authority for the proposition that a legislature could recognize degrees of evil in dealing with information thrust upon captive audiences. The Court also cited the *Breard* case. In *Lehman*, the Court emphasized that even in granting access to public places for the purposes of free speech, the nature of the forum and the conflicting interests involved remained important in determining the degree of protection to be afforded. At page 302, the Court said:

"These situations are different from the traditional settings where First Amendment values inalterably prevail. Lord Dunedin, in M'Ara v. Magistrates of Edinburgh [1913] Sess Cas 1059, 1073-1074, said, '[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place.' Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question. See, e.g., Cox v. New Hampshire, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941); Breard v. Alexandria, supra; Poulos v. New Hampshire, 345 US 395, 97 L Ed 1105, 73 S Ct 760, 30 ALR2d 986 (1953); Cox v. Louisiana, 379 US 559, 13 L Ed 2d 487, 85 S Ct 476 (1965); Adderley v. Florida, 385 US 39, 17 L Ed 2d 149, 87 S Ct 242 (1966); Red Lion Broadcasting Co. v. FCC, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969); Police Department of Chicago v. Mosely, 408 US 92, 33 L Ed 2d 212, 92 S Ct 2286 (1972); Grayned v. City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972); Columbia Broadcasting v. Democratic National Committee, 412 US 94, 36 L Ed 2d 772, 93 S Ct 2080 (1973); Pittsburg Press Co v. Pittsburgh Comm'n on Human Relations, 413 US 376, 37 L Ed 2d 669, 93 S Ct 2553 (1973).

In his concurring opinion Mr. Justice Douglas emphasized on page 306 that a street car or a bus is plainly not a part of a sidewalk or other meeting place for discussion anymore than it is a highway. It is only a way to get to work or back home. Justice Douglas pointed out on page 307:

"In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuter to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."

Certainly, what is said about commuters on a public busline is even more compelling when applied to homeowners seeking to enjoy the privacy of their residences.

The Village Board can well make the determination as a responsible legislative body that *bona fide* charitable organizations, because of the public interests that they serve can be permitted to intrude upon this privacy, but at the same time require that these organizations are, in fact, what they purport to be, rather than mere conduits for the commercial gain of their sponsors. The dissent in *Lehman* turns not upon the question of whether there was an absolute right to use public transit cars as a forum for the exercise of First Amendment but whether once the City

had accepted commercial advertising it could pick and choose between the type of advertising.

The Court of Appeals, in its opinion here, relies upon *Cantwell* v. *Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L.Ed. 1213 (1940), *Schneider* v. *State,* 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939), and *Martin* v. *Struthers,* 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943). These cases are clearly not applicable. In each of these cases, this Court determined that the ordinances in question involved administrative discretion without standards. This Court considered *Cantwell* at length in the *Oradell* case. It also clearly distinguished *Schneider* v. *State* and *Martin* v. *Struthers.* Those cases involved ordinances which required permits without standards and vested unbridled discretion in an administrative officer or simply prevented canvassing completely.

As a matter of fact, in *Cantwell* this Court said, "without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish identity and his authority to act for the cause which he purports to represent." 310 U. S. 296, 306, 84 L. Ed. 1213, 60 S. Ct. 900.

In commenting on the very cases relied upon by the Court here, the Court in *Oradell* at 425 U. S. 619, said:

> "These opinions of the Court and the dissenting opinions found common ground as to the important municipal interests at stake. See Martin v. Struthers, supra, at 152, 87 L. Ed. 1313, 63 S. Ct. 862 (Frankfurter, J., dissenting); id., at 154, 87 L. Ed. 1313, 63 S. Ct. 862 (Reed, J., dissenting); Douglas v. Jeannette, 319 U. S. 157, 166, 87 L. Ed. 1324, 63 S. Ct. 877 (1963) (Jackson J., dissenting in Martin v. Struthers). Professor Zechariah Chafee articulated something of the householder's right to be let alone, saying:
>
> > 'Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.' Free speech in the United States 406 (1954).
>
> Professor Chafee went on to note; '[These cases] do not invalidate all ordinances that include within their scope . . . doorway dissemination of thought. Several sentences in the opinions state that ordinances suitably designed to take care of legitimate social interests are not void.' Id., at 407."

In *Breard* v. *Alexandria,* 341 U. S. 622, 95 L. Ed. 1233 (1951) the Court specifically sustained a municipal ordinance which prohibited peddlers or canvassers from calling upon the occupants of private residences without having been invited. As applied to solicitors for magazine subscriptions the Court held there was no violation of the First Amendment. In *Va. Pharmacy Board* v. *Va. Consumer Council,* 425 U. S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), the Court in discussing the application of the First Amendment to drug advertising said: "The First Amendment as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."

The quotation at 590 P. 2d 226, from Justice Brennan in *Hynes* quoting *Thomas* v. *Collins,* 323 U. S. 516, 65 S. Ct. 315, 323, 89 L. Ed. 440 (1945), is not relevant. Justice Brennan's remarks clearly were related to restraining orderly discussion and persuasion at an appropriate time and place. We suggest that the invasion of a private home uninvited and at inappropriate hours is not a proper time and place for orderly discussion and persuasion. We think it is clear that Section 20(g) of Chapter 22 of the Schaumburg Village Code is not invalid on its face nor as applied to the Respondent's organization.

B. The Ordinance in Question Is Not Unconstitutional Because of Vagueness.

An examination of the Court of Appeal's opinion indicates that the opinion was not based upon the alleged "vagueness" of the ordinance. The Court does say that "Chapter 22 does present problems similar to those encountered with regulations previously struck down for vagueness." 590 F. 2d 224. Other references are made in the opinion to sections which are allegedly "unclear" but the Court fell short of holding the ordinance void because of vagueness.

Nevertheless, it is useful to determine whether or not the ordinance in question suffers the fatal defect that resulted in the invalidation of the *Oradell* ordinance. We suggest that the ordinance is clear on its face and is not subject to the claims of vagueness alleged by the Respondents pleadings in the trial court.

We have pointed out above that the 75% requirement is only one of several specific standards which when met entitle an applicant to a permit. Upon meeting of these conditions there is no discretion in the Village Board. It must issue a permit.

This Court has repeatedly set forth the standards which are to be applied in determining whether a statute or ordinance is impermissibly vague. In *Broadrick* v. *Oklahoma*, 413 U. S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), the Court said:

> "We have held today that the Hatch Act is not impermissibly vague. CSC v Letter Carriers, 413 US 548, 37 L Ed 2d 796, 93 S Ct 2880. We have little doubt that § 818 is similarly not so vague that 'men of common intelligence must necessarily guess at its meaning.' Connally v. General Construction Co., 269 US 385, 391, 70 L Ed 322, 46 S Ct 126 (1926). See Grayned v. City of Rockford, 408 US 104, 108-114, 33 L Ed 2d 222, 92 S Ct 2294 (1972); Colten v. Kentucky, 407 US 104, 110-111, 32 L Ed 2d 584, 92 S Ct 1953 (1972); Cameron v. Johnson, 390 US 611, 616, 20 L Ed 2d 182, 88 S Ct 1335 (1968). Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it. Grayned v. City of Rockford, supra, at 108, 33 L Ed 2d 222, 92 S Ct 2294. In the plainest language, it prohibits any state classified employee from being 'an officer or member' of a 'partisan political club' or a candidate for 'any paid public office.' It forbids solicitation of contributions 'for any political organization, candidacy or other political purpose' and taking part 'in the management or affairs of any political party or in any political campaign.' Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in § 818 as 'partisan,' or 'take part in,' or 'affairs of' political parties. But what was said in Letter Carriers, supra, at 578-579, 37 L Ed 2d at 816, is applicable here: 'there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.' "

In *Grayned* v. *City of Rockford*, 408 U. S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972), the Court held valid an anti-noise ordinance of the City of Rockford which made it unlawful for any person while on a public or private grounds adjacent to a building in which school was in session to "willfully make or assist in making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." This Court at page 110 said:

> ". . . We find no unconstitutional vagueness in the anti noise ordinance. Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' Esteban v. Central Missouri State College, 415 F2d 1077, 1088 (CA 8 1969) (Blackmum, J.), cert denied, 398

US 965 (1970), but we think it is clear what the ordinance as a whole prohibits."

See also, *Arnett* v. *Kennedy*, 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), where the Court rejected the challenge to the Lloyd-La Folette Act relating to personnel removal or suspension "only for such cause as will promote the efficiency of the service." The Court there held that the standard was not impermissibly vague. At page 159, the Court said:

> "We hold the standard of 'cause' set forth in the Lloyd-LaFollette Act as a limitation on the Government's authority to discharge federal employees is constitutionally sufficient against the charges both of overbreadth and of vagueness. In CSC v Letter Carriers, 414 US 548, 578-579, 37 L Ed 2d 796, 93 S Ct 2880 (1973), we said:
>
> > [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offense to which . . . [the provisions are] directed is plainly within [their] terms . . . , [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." United States v. Harriss, 347 US 612, 618 [98 L Ed 989, 74 S Ct 808] (1954).'
>
> Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. As we said in Colten v. Kentucky, 407 US 104, 32 L Ed 2d 584, 92 S Ct 1953 (1972);
>
> > 'The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.' Id., at 110, 32 L Ed 2d 584."

We believe it is thus clear that the ordinance in question cannot be held to be unconstitutional because of vagueness. The mere fact that the Court of Appeals could stretch to find some situations which may or may not arguably be covered by the ordinance does not mean that the ordinance must thereby fall. The Court of Appeals said that Articles II and III do not necessarily cover all possible situations in door-to-door solicitations but that does not mean that the ordinance is not applicable to the Respondent nor does it render the ordinance constitutionally impermissible. A legislative body need not legislate to meet all possible evils. It can deal with substantial problems without exhausting every conceivable instance where problems may occur.

The First Amendment does not mean that a municipality acting under its police power cannot protect its homeowners from uninvited disturbance by purportedly charitable organizations which do not meet reasonable standards for demonstrating their charitable character. The First Amendment is not an unbridled license to permit intrusion into the privacy of a citizen's home. Even if the solicitor seeks not only funds but the dissemination of a particular form of information or the sale of printed material he is not constitutionally immune from the municipality's power to regulate the type of solicitation sought here.

This Court has recognized most recently in the *Hynes* case the vital state interest in the protection of the homeowners from uninvited solicitors. The defect in *Hynes* is not present in the Schaumburg ordinance scheme. We suggest that the ordinance is not vague; it is not unconstitutional on its face or ts applied. We, therefore, respectfully suggest that the Court of Appeals erred and should be reversed.

II.

A MUNICIPALITY HAS THE RIGHT TO PROHIBIT PURPORTEDLY CHARITABLE SOLICITATIONS WHEN THE SOLICITING ORGANIZATION FAILS TO DEMONSTRATE THAT AT LEAST 75% OF ITS RECEIPTS ARE UTILIZED FOR ITS CHARITABLE PURPOSES.

The Court of Appeals, below as did the Fifth Circuit in the *National Foundation* case, recognized that a municipality has a legitimate interest in protecting its citizens from fraud by solicitors who would use the funds collected for purposes other than those expressly or impliedly represented. This aspect of the police power is in addition to the right to protect from annoyance and danger and promote the peaceful enjoyment of the home recognized in the *Hynes* case. This Court has repeatedly held in *Oradell, Cantwell* and *Martin* v. *Struthers* that there are important municipal interests at stake. Professor Chafee has articulated the householders' right to be left alone pointing out that the possibilities of persuasion are slight compared to the certainty of annoyance.

We have suggested above that the right of freedom of speech must be exercised in a time, place and manner which does not impinge upon the rights of privacy and security in one's home. The Court of Appeals below decided this case purely on a First Amendment basis. The equal protection argument though advanced below, was not acted upon by either the trial court or the Court of Appeals. It is pertinent to observe, however, that when solicitation of funds is involved, the legislative body can well impose restrictions which might otherwise be inappropriate for the unalloyed exercise of freedom of speech.

Both the *National Foundation* case and this case below recognized that when solicitations for funds are involved, there are additional aspects which give rise to the police power not otherwise present in cases involving solely freedom of expression. When freedom of speech is coupled with the solicitation of funds,

additional public interests are involved which warrant a less restrictive view of the state's right to regulate such activities.

It may be true that a householder can be equally disturbed by a knock on the door when the caller's objective is purely informational as when his objective is commercial or the solicitation of funds. We suggest however that the legislative body can well treat differently the solicitor whose ultimate objective is commercial gain rather than the pure dissemination of information and opinion. The legislative body in the exercise of its police power can reasonably make a distinction as did the Village Board here between solicitation for genuinely charitable purposes and those who would use the cloak of charity to mask their pursuit of commercial gain.

The cases which have invalidated ordinances which purported to regulate or prohibit door-to-door solicitations turned upon unabridged discretion, vested usually in administrative officers to issue permits and did not announce a rule that solicitation of funds in the name of charity was beyond the scope of reasonable municipal regulation. When, as is apparently the case here, a majority of the funds are utilized not for the charitable purposes for which the organization was purportedly organized, but instead to compensate canvassers, officers, and employees, it must be concluded that what is involved is nothing more nor less than a commercial enterprise even though it be dressed in the trappings of a charitable or environmental purpose.

Schaumburg's ordinance is intimately related to the articulated substantial governmental interests clearly recognized by this Court in *Hynes* and *Breard*. The protection of citizens from misrepresentation, crime and undue annoyance and in the quiet enjoyment of their homes are well recognized, articulated and substantial governmental interests. In fact, they are paramount objectives of any organized society.

A homeowner has a legitimate right to know whether or not the solicitor who presents himself at his door as a representative

of a charitable organization is in fact telling the truth. If a citizen inquires as to whether a solicitor has received a permit from the municipality, he knows immediately whether or not the solicitor represents a charitable organization as recognized by the Village or is involved in either a commercial or even fraudulent enterprise.

The Village, as an exercise of its police power, clearly has the right to prescreen individuals who would represent themselves as charitable solicitors. It is not censoring the views of CBE or any other group. All the traditional methods of communication are open, be they radio, television, newspapers or even handbills in the public streets. The Village is merely seeking to require that persons who go upon the private property of its citizens and represent themselves as charitable solicitors are in fact what they claim to be. No legitimate views are being barred from the Village of Schaumburg nor is any chilling effect on the First Amendment presented.

An ordinance of this nature must set forth standards which are specific and not vague. (See above.) However, it is clear that this ordinance does in fact set forth specific standards. In the case of *Grayned* v. *City of Rockford,* 408 U. S. 104, 33 L. Ed. 2d 222, this Court held valid as not vague an anti-noise ordinance. Relying upon *Tinker* v. *Des Moines School District,* 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), it held that the ordinance was not overbroad or vague. Moreover, in *Grayned* this Court further held that expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others. The Court went on to note that:

> "Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activities should be restricted at a particular time and place. . . . Such a reasonable regulation is not inconsistent with the First and Fourteenth Amendments."

The specific standards of this ordinance make it clear that the Village has properly legislated to restrict some kinds of expressive activity at a particular time and place, in this instance, at the domiciles of its citizens. We have previously discussed the *Oradell* case at length and pointed out that the standards imposed in the Schaumburg ordinance clearly meet the requirements of the opinion.

The *National Foundation* case recognizes the right of a municipality to prohibit solicitations for funds by charitable organizations when in fact a disproportionate amount of the funds are not used for charitable purposes. *Breard* injected the argument that prohibiting door to door solicitation violated the First Amendment. We suggest that under the decisions of this Court and in the interest of the public welfare, a municipality does have the right to prohibit so-called charitable solicitations when less than 75% of its receipts are utilized for charitable purposes. To transform this exercise of municipal authority into a violation of the First and Fourteenth Amendment would, in the words of this Court in the *Breard* case, constitute "a misuse of the great guarantees of free speech and free press."

The Illinois Appellate Court in *People ex rel. Scott* v. *Police Hall of Fame,* 60 Ill. App. 3d 331 (1978), recognized that no First Amendment rights were violated when charities were required to use 75% of their gross receipts for charitable purposes. In that case the Illinois Charitable Act was challenged. The statute required the application of 75% of gross receipts toward charitable purposes as therein defined. A specific First Amendment challenge to this provision was made. The Court concluded that the fund raisers' claim of unconstitutionality did not demonstrate an abridgment of First Amendment freedoms.

The Court went on to say: "That statutory formula was devised to secure protection for the donations given charities by the public and we do not perceive that it unconstitutionally limits the charities in the exercise of their first amendment rights."

The Village of Schaumburg is a home rule municipality under the Illinois Constitution of 1970. Under that Constitution there is a direct grant of police power to home rule municipalities. Subsection 6 of Article VII of the Illinois Constitution provides that except as limited in that section "a homerule unit may exercise any power and perform any function pertaining to its government and affairs including but not limited to the power to regulate for the protection of public health, safety, morals and welfare; to license; to tax; and incur debt."

The Illinois Supreme Court has interpreted this provision as vesting in of homerule municipalities and their legislative bodies the same powers enjoyed by the Illinois General Assembly. In commenting on § 6 of Article VII of the Illinois Constitution, the Illinois Supreme Court in the case of *City of Urbana* v. *Houser*, 67 Ill. 2d 268, 367 N. E. 2d 692 (1977) at page 273 said: "Home rule units thus have the same powers as the sovereign except where such powers are limited by the General Assembly." Such municipalities may impose standards by local ordinance which differ from or exceed the requirements of the State.

It is thus clear that the Village of Schaumburg has a direct constitutional grant of police power which enables it to enact the kind of legislation at issue here. The exercise of the legislative judgment by the Village Board was well within the discretion which this Court should respect. In attempting to balance the interests of charitable organizations in their solicitation efforts against the right of homeowners to be safe from fraud, crime and annoyance, the Village has chosen the technique which is at issue here. The regulation seeks to deal with substantial problems in a meaningful and realistic way.

State legislatures and courts as well as the federal courts, have recognized the legitimacy of limiting charitable solicitations in a manner which will preserve the true charitable character of the activity represented to the public. We suggest that the Petitioner has the right to prohibit purportedly charitable solicitations in the manner set forth in its ordinance. Such regulation does not violate the First Amendment and this Court ought not to substitute its judgment for that of the legislative body.

III.

THE RESPONDENTS WERE NOT ENTITLED TO A SUMMARY JUDGMENT.

This case was decided at the trial level and affirmed by the Court of Appeals on a motion for summary judgment. The finding of the trial court was that the ordinance was unconstitutional on its face. The Court of Appeals refused to go that far. Instead it specifically said at 590 F. 2d 220, 225:

> "We do not decide the reasonableness of the 75% requirement as applied to solicitation by the more traditional charitable organizations. However for the reason stated below, the requirement is on its face unreasonable when applied to an organization which by its nature allegedly devotes a large portion of its efforts to information gathering and promotion of its objectives, and where its paid solicitors necessarily combine solicitation with other primary activities of the organization."

The Court of Appeals thus found itself in the anomalous position of agreeing that the ordinance is not invalid on its face and conceding that it would not decide the reasonableness of the 75% requirement, but, at the same time, holding the ordinance invalid as applied to the Respondents without having given the Village an opportunity to demonstrate why the ordinance was reasonable as applied to CBE.

We suggest that on the reasoning of the Court of Appeals' opinion alone, the granting of a motion for summary judgment

was improper. Since the ordinance concededly was not invalid on its face and its reasonableness was to be determined apparently by the character of the organization, the Court of Appeals should not have precluded an investigation into the character of the Respondent organization.

An examination of the motion for summary judgment and the affidavit of Hoellwarth makes it clear that the factual background of this controversy as sketched in the pleadings and as revealed in the Hoellwarth affidavit is so incomplete as to preclude the entry of the summary judgment. In order to sustain the motion for summary judgment, the Court of Appeals had to make assumptions as to the character of the organization involved when there were controverted allegations as to the character of that organization. The only way it could have sustained the trial court's granting of a motion for summary judgment was to hold the ordinance invalid on its face which it refused to do.

The function of a motion for summary judgment is not to weigh the evidence or to resolve a conflict as revealed in the pleadings or the affidavits. Summary judgment can only be granted when the moving party is entitled to a judgment as a matter of law.

The rules with respect to summary judgment are well known and extensive discussion and citation are not necessary here, Rule 56(c) of the Rules of Civil Procedure relating to motions for summary judgment provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Court on numerous occasions has considered the implications of the motion for summary judgment and has refused to approve summary judgments when inferences could be drawn from underlying facts, which when viewed in the light most favorable to the party opposing the motion, would indicate the presence of a material issue of fact. In the case of *Associated*

Press v. *United States of America,* 326 U. S. 1, 89 L. Ed 2013, 65 S. Ct 1416 (1945), the Court noted that: "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."

In the case of *Sartor* v. *Arkansas Nat. Gas Corp.,* 321 U. S. 620, 88 L. Ed 967 (1943), the Court, in holding that a summary judgment was improperly granted, commented at page 627:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Ins. Co. v. Gentile Bros. Co. (CCA 5th) 109 F(2d) 732; Whitaker v. Coleman (CCA 5th) 115 R(2d) 305)."

The Court went on to conclude on page 628:

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed."

The Court in the leading case of *United States* v. *Diebold,* 369 U. S. 654, 8 L. Ed. 2d 176, 177 (1962), said: "On summary judgment the inferences to be drawn from the underlying facts contained in (such) materials must be viewed in the light most favorable to the party opposing the motion." The Court there concluded that the materials before the District Court, having raised a genuine issue as to ultimate facts, it was improper to decide the issue on a motion for summary judgment.

In the case of *Adickes* v. *Kress & Co.,* 398 U. S. 144, 26 L. Ed. 2d 142 (1970), the Court again discussed at length the

criteria for granting a motion for summary judgment. At page 152, the Court said:

> "Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the District Court, however, convinces us that summary judgment was improper here, for we think respondent failed to carry its burden of showing the absence of any genuine issue of fact."

The Court went on to say at 398 U. S. 158:

> " '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 US 654, 655, 8 L.Ed.2d 176, 177, 82 S Ct 993 (1962).' "

It further commented at 160:

> "And, in a comment directed specifically to a contention like respondent's, the Committee stated that '[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if not opposing evidentiary matter is presented.*' "

It concluded its discussion of the motion for summary judgment at page 161 when it said:

> "Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required. 6 J Moore, Federal Practice Par. 56.22[2], pp. 2824-2825 (2d Ed 1966)."

The basic rule was also well stated in *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 7 L. Ed. 2d 458 (1962), where the Court at page 461 said:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed Rules Civ Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp. 321 US 620, 627, 88 L ed 967, 972, 64 S Ct 724 (1944)."

The affidavit of Larry Hoellwarth in support of the motion for summary judgment is not helpful in determining whether or not there are material issues of fact to be decided. The only allegation of the affidavit which bears upon what the Respondent actually does is paragraph 8 of the affidavit which in essence states that representatives of CBE distribute pamphlets on environmental subjects and on CBE activities, answer questions, accept signatures, and accept contributions from residents. Such activities, even if in fact true, would not necessarily preclude the type of regulation contained in the Schaumburg ordinance.

If, as the trial court is required to do, it drew inferences most favorable to the party opposing the motion, it could well infer that the activities described by Hoellwarth are in fact of a fully commercial nature. As the cases on door-to-door solicitation point out, there is a dichotomy between the exercise of freedom of speech and religion on the one hand and purely commercial activities on the other. The Village has adopted regulations covering commercial peddlers and solicitation which are not in issue here. The mere fact that the material which is sold may be informative does not change the commercial character of the business undertaking.

Likewise, the mere fact that an organization is organized as not-for-profit, or even approved by the Attorney General as a

charitable organization, does not mean that the solicitation itself is not commercial in nature. It is because of the fact that the Village desires to make certain that commercial activities are not clothed with the appearance of charity that the 75% requirement has been imposed. The affidavit of Hoellwarth, who was not subject to cross-examination as the result of the granting of the motion for summary judgment, is insufficient by itself to support a motion for summary judgment. Yet, only that affidavit appears in the record to support the purported First Amendment activities of the Respondents.

The Village at least should be entitled to inquire into whether what CBE does is protected under the First and Fourteenth Amendments. It was effectively precluded from doing so by the granting of the motion for summary judgment.

We therefore respectfully suggest that the trial court as a matter of law erred in granting the motion for summary judgment, and this cause should at least have been remanded. The trial court should also be required to take evidence on the question of just what CBE in fact does, which brings it within the purview of First Amendment protections. In this connection it might be noted that attached to the Village's answer as an exhibit in support of its allegations on information and belief, was a newspaper article headlined "Is $$ Real Cause in Clean Air Fight?" The information contained in that article at least gives some basis for believing that CBE is engaged primarily and overwhelmingly in the business of making money for its officers and canvassers. Whatever the merits of the free enterprise system as applied to these canvassers, the truth of the alleged facts must be determined in order to ascertain the extent to which the activities in question are subject to First Amendment protection.

It should be noted that the Respondents did not file a reply or in any manner controvert the allegations in the Village's answer. Therefore, for the purposes of the motion for summary judgment, the allegations in the answer as affirmative defenses, including the exhibits, must be taken as true. The exhibit indicates that more than two-thirds of the $290,399 collected by CBE in fiscal year 1974-75 was spent on salaries and employee health benefits. Slightly smaller percentages have been spent on salaries each year since CBE's founding. The exhibit points out that about 69% of the salaries were paid to solicitors and fundraisers and 31% to program organizers, and contrasts these figures with the salary and benefit costs of 27% for the American Cancer Society, 15% for the Heart of Illinois United Way Organization, and 22% for the Chicago Chapter of the National Multiple Sclerosis Society.

It should also be noted that the New York Attorney General's office filed suit against CBE, charging the organization had perpetrated a "fraud upon the public" by using 74% of the $175,808 collected in fiscal year 1972-73 for administration and fund raising expenses. The suit never came to trial because of the demise of the New York organization.

We suggest that these allegations, which are stated on information and belief, as shown on an exhibit to our answer, raise serious questions as to whether or not the activities of the Respondents are in fact a charitable, not-for-profit activity which is protected by the First and Fourteenth Amendments. We believe we are entitled to a trial on these issues, and that the trial court erred in granting the motion for summary judgment.

The Court of Appeals, in its opinion, ignores the question as to whether a summary judgment was proper because of the presence of controverted material issues of fact. The Court concludes that the constitutional validity of Section 22-20(g) is solely a question of law. However, subsequently the Court specifically determines that it will not pass upon the reasonableness of the 75 percent requirement as applied to the "more traditional charitable organizations".

The Court, however, goes on to say, "the requirement is on its face unreasonable when applied to an organization which by its nature *allegedly* devotes a large portion of its efforts to

information gathering and promotion of its objectives, and where its paid solicitors necessarily combine solicitation with other primary activities of the organization." (Emphasis added.)

Yet the record does not permit the Court to reach this conclusion with respect to the nature of the organization in question. The very nature of the organization is controverted in the pleadings. The Court of Appeals could not reach its conclusion that the ordinance was unconstitutional on its face without passing upon its reasonableness generally, absent a factual determination as to the nature of the organization in question.

In the case of *Citizens for Better Environment* v. *Nassau County*, 488 F. 2d 1353 (CCA 2, 1973), the Court of Appeals refused to grant a preliminary injunction sought by the Respondents' New York branch against certain municipalities seeking to enforce local solicitation ordinances. The case is instructive on several points which are involved in this proceeding. Footnote 1 which appears on page 1355 refers to *National Foundation* v. *City of Fort Worth*, 415 F. 2d 41, and says: "CBE concedes the validity of *National Foundation*. . . ." In the *Nassau County* case, the question was whether CBE was in fact a charitable organization within the meaning of an exemption granted by local ordinance. As here, CBE was registered with the Internal Revenue Service and with the State Attorney General's office.

In its motion for a preliminary injunction, CBE had filed affidavits alleging in substance that its primary activity was sending its employees door-to-door to talk with residents about environmental problems, distribute the organization's literature and solicit contributions. It contended that because of its nonprofit nature together with its registration under the State's Solicitation Statutes it was exempt from local ordinances which on their face exempted "charitable" organizations. The Court of Appeals in denying the preliminary injunction noted at page 1362:

> "Most notably there are still serious questions concerning the nature of CBE's campaign and the import as a charitable organization under state law. Rather than attempt to resolve these issues in an evidentiary hearing, CBE rested its motion for preliminary relief on the conflicting affidavits and declarations of CBE and county officials."

The clear import of the *Nassau County* decision was that the factual status of CBE was to be determined in an evidentiary hearing rather than on the kind of affidavit present there, which was essentially the same as Hoellwarth's affidavit in the instant case.

There is no question that the basic issues presented in this case are those related to the First Amendment. As we have indicated above, we believe that the First Amendment does not prevent the Village from enacting or enforcing the ordinance in question here. We suggest, however, that the very posture of this case, decided as it was on a motion for summary judgment although material issues of fact remained to be decided, made the case inappropriate for the fiind of determination made by the Court of Appeals.

CONCLUSION.

Based on the foregoing, we respectfully suggest that the trial court erred in granting the motion for summary judgment and the Court of Appeals also erred in affirming that decision.

We believe we have conclusively demonstrated that Section 22(g) relating to the 75% limitation in a charitable solicitation ordinance is not invalid either on its face or as applied. The ordinance does not violate the First Amendment or impinge upon the constitutional rights of the Respondents. We suggest that a municipality has the right to prohibit solicitations for funds under the guise of charity, when less than 75% of the funds actually go to the purported charitable purpose. The petitioner has the right under its police power to protect its citizens from the invasion of their homes by individuals who would use the great protections of the First Amendment to erroneously misrepresent the nature of their solicitations.

At the very least, this Court must conclude that the entry of a summary judgment based upon the record before the trial court was erroneous. We, therefore, respectfully pray that this Court reverse the Court of Appeals for the 7th Circuit. We ask that Section 22(g) of the ordinance of the Village of Schaumburg be held to be constitutional on its face and as applied.

Respectfully submitted,

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APPENDIX.

AMENDMENTS TO UNITED STATES CONSTITUTION.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SCHAUMBURG VILLAGE CODE, CHAPTER 22, ARTICLE III.

Article III. Charitable Organizations.

Sec. 22-19. Definitions.

For the purpose of this article, the following words and phrases shall have the following meanings unless a different meaning is required by the context:

Charitable organization. Any benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes.

Charitable purpose. Any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose.

Contribution. The promise or grant of any money or property of any kind or value, including payments for literature in excess of the fair market value of said literature. (Ord. No. 1052, § 2.)

Sec. 22-20. Permits—Required; contents of application.

Every charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit. Said application shall be made to the village clerk and shall include the following information:

(a) The name of the organization and the name under which it intends to solicit contributions.

(b) The name and address of the person in charge of solicitation in the village.

(c) The names and addresses of all the persons who will solicit contributions in the village.

(d) The dates and times of day such solicitations are to be made and the geographic area within the village wherein such solicitation shall be conducted at a particular time and day.

(e) A written statement of recent date by the Attorney General of Illinois that the organization has complied with the provisions of "An Act to Regulate Solicitation and Collection of Funds for Charitable Purposes," Illinois Revised Statutes, chapter 23, section 5101, and such statute as it may hereafter be amended.

(f) Satisfactory proof that the organization is a tax exempt organization under the Internal Revenue Code of the United States, section 501(c)(3).

(g) Satisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization. For such purposes, the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:

(1) Salaries or commissions paid to solicitors;

(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.

For the purpose of satisfying the requirements of subparagraph (g), the organization shall submit a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization. (Ord. No. 1052, § 3.)

Sec. 22-21. Same—Submission and vertification of applications; issuance.

All applications shall be submitted to the village clerk and shall be verified under oath by a responsible officer of the soliciting organization. All completed applications shall be submitted by the village clerk to the village board. If the village board shall find and determine that all requirements of this article have been met, a permit shall be issued specifying the dates and times at which solicitation may take place. (Ord. No. 1052, § 7.)

Sec. 22-22. Same—Fee.

Each application for a charitable solicitation permit shall be accompanied by a fee in the amount of ten dollars. (Ord. No. 1052, § 6.)

Sec. 22-23. Indicted or convicted felons as solicitors.

It shall be unlawful for any charitable organization to utilize as a solicitor any person who has been convicted of a felony or is presently under indictment for a felony. (Ord. No. 1052, § 5.)

Sec. 22-24. Hours; entering premises posted for "no soliciting."

No permit issued under the provisions of this article shall permit solicitation before the hour of 9:00 A.M. and after the hour of 6:00 P.M., or on Sunday. Nothing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating "no solicitors or peddlers invited." (Ord. No. 1052, § 4.)